U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 July 2003

BALCA Case No.: 2002-INA-199
ETA Case No.: P2002-WA-09514904/ET

In the Matter of:

THE ESSENTIAL BAKING CO.,
Employer,

on behalf of

ARACELI HERNANDEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM, This case arises from an application for labor certification[1] filed by a bread and pastry production/distribution company for the position of Cook, Pastry (lead). (AF 22-23).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

STATEMENT OF THE CASE

On February 6, 2001, Employer, The Essential Baking Company, filed an application for alien employment certification on behalf of the Alien, Araceli Hernandez,

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

to fill the position of Lead Pastry Cook. Minimum requirements for the position were listed as two years experience in the job offered. (AF 22).

Employer received eleven applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified, disinterested and/or unavailable for the position. (AF 27-28).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on March 5, 2002, proposing to deny labor certification based upon a finding Employer had rejected an apparently qualified U.S. worker for other than lawful, job-related reasons. (AF 16-18). The CO categorized Employer's stated basis of an "unstable work history" as arbitrary and not a lawful, job-related reason to disqualify applicant Johnson. The CO noted that his resume showed the required amount of experience. Employer was instructed to submit rebuttal documenting that this U.S. worker was rejected solely for lawful, job-related reasons.

In Rebuttal, Employer reiterated his conclusion that the applicant was not qualified because of his unstable work history of "having about one job per year for the past twelve years" and stated that an additional basis for rejection was that upon further investigation Employer had discovered the applicant was unwilling to work the hours of the job offer. Employer informed that the applicant was hired for a lesser, entry-level position. (AF 9-11).

A Final Determination denying labor certification was issued by the CO on April 15, 2002, based upon a finding that Employer had failed to adequately document lawful rejection of U.S. worker Johnson. (AF 7-8). Noting that Employer had hired the applicant for another position in the company despite the applicant's work history, the CO found Employer's basis for rejection unconvincing and not a lawful, job-related basis for rejection.

Employer filed a Request for Review by letter dated May 8, 2002, and the matter was referred to this Office and docketed on June 19, 2002. (AF 1-6).

DISCUSSION

Federal regulations at 20 C.F.R. § 656.24(b)(2)(ii), state in part that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Section 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *See Cathay Carpet Mill, Inc*., 1987-INA-161 (Dec. 7, 1988)(*en banc*).

In the instant case, Employer rejected a U.S. worker applicant for the job opportunity for which labor certification was sought because Employer had determined the applicant, having "held at least 10 positions in the past 12 years," was "extremely unstable in his professional life." It was Employer's belief "that it is quite probable that Mr. Johnson would not remain employed in my company long enough to justify the expense of hiring and training him." The CO concluded this was not a valid basis for rejection. On the facts of the instant case, we agree.

The Board of Alien Labor Certification Appeals (BALCA) has repeatedly held that a U.S. applicant may not be lawfully rejected for being overqualified or because he may only stay in the position a short time. *See Ken-Med Products Corp*., 1991-INA-196 (June 30, 1992); *Integrated Business Solutions, Inc*., 1994-INA-209 (June 22, 1995); *Upholstery Creations*, 1994-INA-470 (Aug. 21, 1995); *IPF Int'l, Inc*., 1994-INA-586 (July 24, 1996). Employer cannot merely assume that the applicant will not stay in the job for a long period of time. *Baker Boy, Inc.*, 1991-INA-270 (Oct. 5, 1992).

Moreover, in the instant case, Employer has misstated the applicant's employment history and overlooked the fact that the majority of the applicant's job changes show a steady progressively increasing level of responsibility. Applicant Johnson did not "have about one job per year for the past twelve years" as Employer states, but rather, held several of the positions for 2-1/2 to 3 years. (AF 34-35). In addition, upon review of the other applicant resumes submitted, it appears not uncommon in the industry to see frequent job movement within the food industry. (*See* AF 46,47,58,62,65,69,71). Also, Employer has not documented whether he attempted to contact prior employers or question the applicant about changing jobs frequently. *See Ernie Vejar Landscape Maintenance*, 1994-INA-189 (July 19, 1995).

In his rebuttal, Employer stated that another basis for rejection was the applicant's unwillingness to work the hours of the job offer. Employer states that this was not determined at the time of interview because the applicant was not offered the position. However, Employer's initial rejection of the applicant at the time of consideration for the position was reported as due to an unstable work history, which has been determined to be unlawful. Based upon the foregoing, it is determined that labor certification was properly denied.

Finally, after this case was referred to the Board, Employer submitted a letter stating that applicant Johnson had quit the entry-level position for which he was hired on September 25, 2002, which according to Employer validates its claim that "his unstable work history disqualified him for [the petitioned position]." Generally, evidence not in the record upon which the denial was based, but first submitted after the Final Determination, cannot not be considered on appeal. O*'Malley Glass & Millwork Co.*, 1988-INA-49 (Mar. 13, 1989); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). Here, assuming arguendo that this evidence is properly considered by the Board because it is newly available, we nonetheless conclude that it is does not remedy the violation. Mr. Johnson may have left the job because it was an entry level position rather than because he was not "stable."

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.